

Two-Day Title IX Conference

Day 1: Investigator Track

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Welcome!



- Name
- University
- Job Title
- Role on the Title IX Team
- One thing you remember from childhood that today's incoming first-year students wouldn't understand

Rules for Participation

- Today we're going to do a lot of role-playing. This is an opportunity to practice and learn. Don't be afraid to take chances and make mistakes.
- Use "for the sake of argument..."
- We have built in breaks, but we know life happens. Step away when you need to.
- If you find today to be surprisingly exhausting, know that this work can be extra tiring due to the subject matter. Be kind to yourself tonight, as tomorrow is the mock hearing!

Agenda for Today

- Your Role as an Investigator
- What You Need from a Notice of Investigation
- Preparing for an Investigation
 - 10:15 – Break
- Care and Support of Parties: An Investigator's Role
- Interviewing Complainant
 - 12:00 -- Lunch
- Interviewing Respondent
 - 2:15 – Break
- Planning Your Next Moves
- Writing an Investigative Report

Your Role as an Investigator

No Single-Investigator Model for Title IX

- The roles of investigator and decision-maker **MUST** be separate.
- The investigator does not make decisions.



The Investigation and Report

- The investigator has the burden of asking the parties for and collecting all relevant evidence.
- Relevancy may be institution-determined, but we will discuss it further later today.
- Parties have the right to present fact and expert witnesses.
- Issues of relevancy will often not be made until the decision-maker is involved (after your involvement).

The Investigator's Roles

1. The **GATHERER** of all relevant evidence.
2. The **ORGANIZER** of all relevant evidence.

What You Need from a Notice of Investigation

Harvesting the Notice of Investigation

What can we glean from the Notice of Investigation?

- Some institutions include the Formal Complaint, some do not.
- Name of Reporter (can be Complainant or a potential witness)
- Name of Parties
- Narrative – should give details for the Respondent to be able to understand the allegations against them (where, when, who, how, what, etc.)
- Initial charges of what policy violations may be at issues (these can involve over the course of the investigation)

Notice of Investigation and Caution

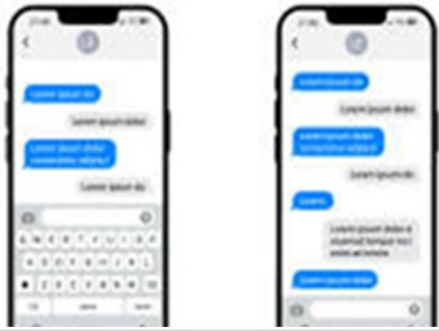
- If new allegations arise during the interview with the Complainant, or at any time during the investigation, be sure to work with the Title IX Coordinator before interview the Respondent about any allegations not in the Notice of Investigation.
- Sometimes the new allegations are naturally related to allegations in the Notice of Investigation and a new notice is not needed, but often, a new Notice of Investigation must be provided to the Respondent before the Investigator can question the Respondent about the new allegation

Preparing for an Investigation

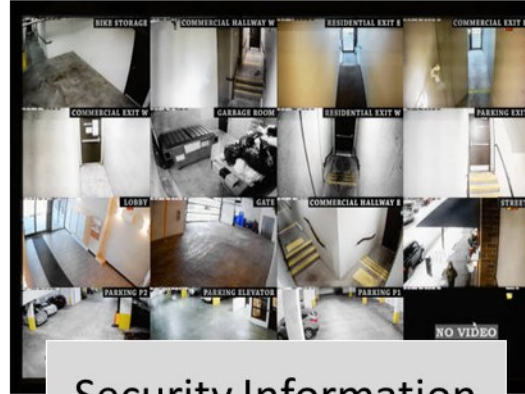
Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
 - What elements do you think will be disputed?
 - Agreed upon?

Begin Evidence List



Electronic
Communications



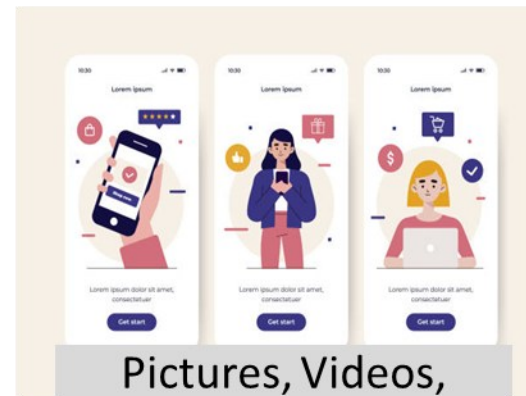
Security Information



Police Reports



Personnel Files,
Student Records



Pictures, Videos,
Audio

↓
If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Begin Witness List

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible



Organizing for the Interview



- What should you have with you?
 - Intake Report
 - Written notice with allegations
 - Investigation log
 - Investigation notes cover sheet
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
 - ? | ← Follow-up questions
 - * ← Potential evidence
 - W ← Potential witness
- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

Simultaneous Criminal Matter

- Is it okay to proceed with the investigation?
- **If not, could be interfering with a police investigation**
- Communicate with your Title IX Coordinator
- May require calling the local police department and/or detective



Remember: The gatherer of relevant evidence

- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

Setting Up the Interview 1 of 2

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods (if available)

Setting Up the Interview 2 of 2

You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:



Date



Time



Location



Participants



Purpose of
interview/meeting

(106.45(b)(5)(v))

Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

Begin Broadly

- Elicit a monologue about the incident
- What happened earlier that day before the incident?
- What happened with regard to the incident?
- What happened next?
- Open-ended follow-up questions
- Specific Questions

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Freeze Frames



- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

When Consent is at Issue

- **Common concern of Title IX Coordinator: investigators not asking the questions to get details needed for incapacitation analysis**
- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- See Level 1 slides for a list of questions to get you started

Credibility

- Gather facts to assist **decision-maker**
- Your job: Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

Questions about Credibility - Bias

- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
 - You charge fees based on an hourly rate?
 - You were paid to produce a written report?
 - Based on this report, you're testifying today?
 - You're charging money for each hour you're here?

Questions about Credibility – Perception and Recall

- What is the witness's perception of the facts?
 - Has **time** impacted recall or ability to remember clearly?
 - How many times has the **witnesses talked to the other party** about this case?
 - Was there **anything** that impacts the person's physical or mental ability to perceive or recall facts accurately?
- Does the witness form a conclusion without knowing certain information?

Questions about Credibility – Inconsistency in Statements

Only happens if you interview the parties or witnesses multiple times

- If a fact was very important, why is the hearing the first time it has come up?
- What possible reasons might the witness have for changing their testimony?
- Did a witness receive coaching from the party or others between making one statement and another?
- Has the witness's perspective or motive changed between statements?
- Does changing this fact help the other party's case?

Questions about Credibility – Example

- **Example: Intoxication level information from witness.**
 - You did not see the consumption, or keep track of how long the party was consuming alcohol?
 - You did not measure the alcohol poured by ____ or the party?
 - Your statements are based on information provided by others? the other party?
 - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc.)?

Remember: Is the person speaking from personal knowledge?

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

After the Witness Leaves (1 of 2)

- Update investigation log
- Review notes, make corrections/clarification
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

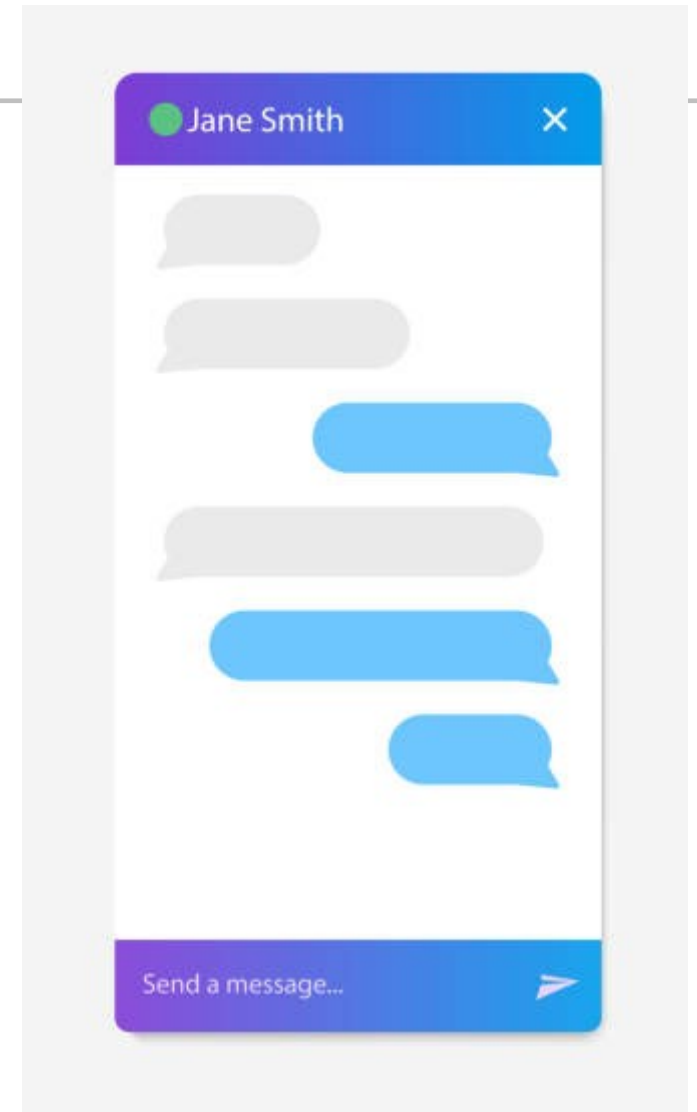


After the Witness Leaves (2 of 2)

- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
 - Remember: notice of allegations must be sent out before you can ask questions of a respondent.
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log. Chain of custody is important!



What about advisors or support persons in interviews?

Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

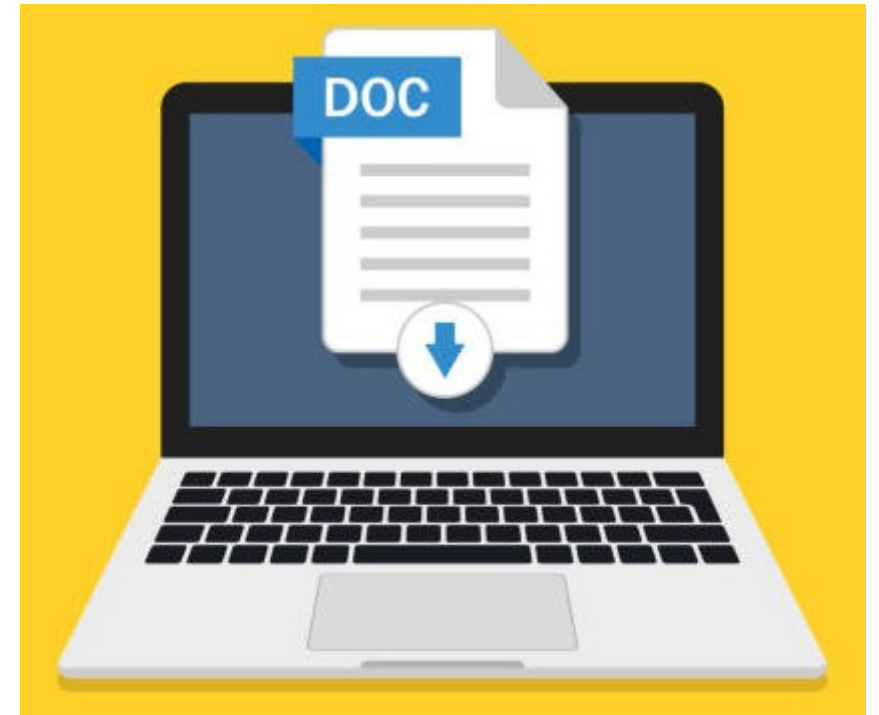
(106.45(b)(5)(iv))

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report (106.45(b)(5)(vi))

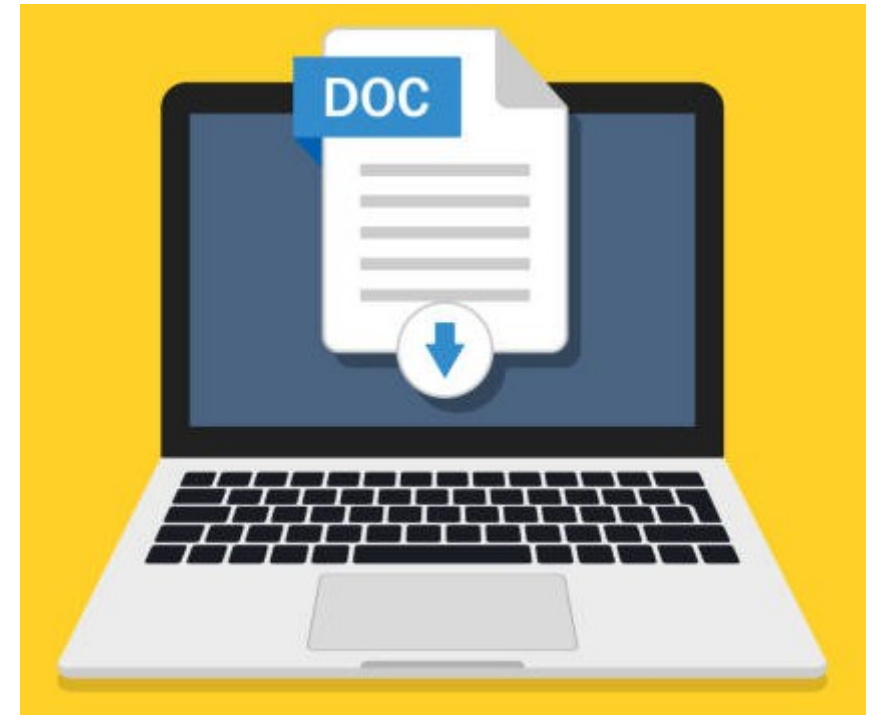
Preliminary Investigation Report



Create Investigative Report

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today

Final Investigation Report



Care and Support of Parties: An Investigator's Role

Ongoing Care and Support

- As the person interacting directly with the parties and witnesses, the Investigator is often on the front line to monitor the wellbeing of the parties and witnesses.
- Be aware of supportive measures, counseling, EAP, and suicide hotlines and follow up with the Title IX Coordinator following interviews in which there are concerns about the party or witness.

Our Case: Group Discussion of Hypo

Small Group Prep: Interviewing Complainant

Prep:

Interviewing Complainant

Interviewing Complainant

Prep:

Interviewing Respondent

Interviewing Respondent

Planning Your Next Moves

Writing and Investigative Report



Writing the Report

Remember: The organizer of all relevant evidence.

1 of 2

1. The **GATHERER** of all relevant evidence.

2. The **ORGANIZER** of all relevant evidence.

Here are some tools for how to best organize all the relevant evidence.

Remember: The organizer of all relevant evidence.

2 of 2

- The Regulations provide that the investigator must create a report that:
- Fairly summarizes relevant evidence
- (106.45(b)(5)(vii))
- What does this mean?

Start with the basic information

- Identify Factual Information:
 - Complainant
 - Investigator
 - Respondent
 - Witnesses
 - Perhaps organize by fact v. expert witnesses or by party whom requested the witness

Consider general organization

- Natural and neutral organization suggestions:
 - Chronological order
 - By topic or allegation
 - Perhaps by chronology within each topic or allegation
 - By chronology of how the information came in to the investigation
 - By witness summary

Explain how organized

- Explain your structure. Example:

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other basic information to include

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?
 - 1/10/22: formal complaint Filed
 - 1/15/22: complainant interviewed
 - 1/17/22: Respondent Interviewed

Identification of witness sign-off

- If this is your practice:
- “Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”
 - Did everyone do so?

A statement regarding relevant evidence

- “All relevant information gathered during the course of the investigation has been included in this report.”
- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence



Identify and include all alleged policy violations

- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety



What to do with evidence



Give an overview of evidence collected

AND



Attach as appendices any statements and important evidence

Be helpful to reviewers – keep it transparent!

- Citations to the record – always
 - Be helpful for your fact-finders!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Include screenshots/pictures in the report?

Text text text text
text text text text
text text text text



YES (and also in appendix)

- Pros: can be illustrative and forefront; reviewer doesn't have to flip to the appendix
- Cons: can make the report bulky

Text text text text text text text text
text text text text text text text text
text text text text text text text text

NO (just include in appendix)

- Pros: can keep the report neat and concise
- Cons: may lose impact if the viewer doesn't jump back and forth between the appendix and text, which can also be annoying for reviewers

What not to include in report (but note requested and why not included) 1 of 3

- The specific type of evidence deemed not relevant in the Regulations:
 - Information protected by a legally recognized privilege
 - Party's medical, psychological, and similar records unless voluntary written consent
 - Rape Shield protection for Complainant

What not to include in report (but note requested and why not included) 2 of 3

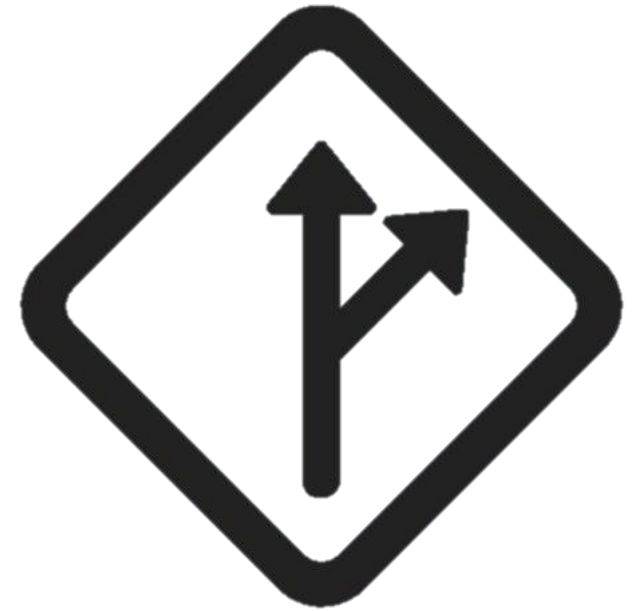
- If evidence is requested by a party and/or you determine it is not relevant, always explain that it was requested and why you determined it was not relevant.

What not to include in report (but note requested and why not included) 3 of 3

- If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

Helpful synthesis

- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
 - “Information from [Complainant]”
 - “Information from [Respondent]”



Summary of Information 1 of 2

- Don't forget to summarize impact on complainant if the charges require consideration as an element
 - *"The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant]."*

Summary of Information 2 of 2

- Undisputed Facts
 - Series of numbered sentences
- Disputed Facts
 - Series of numbered sentences
- Make sure you have facts for each element of each charge.
- **Do not make credibility determinations.**

Thank You

Bricker 
Graydon